

STATE OF CALIFORNIA
California Law Revision Commission

TENTATIVE RECOMMENDATION
relating to
NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

September 1991

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN October 18, 1991.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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#F-3050/L-3050

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TENTATIVE RECOMMENDATION
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INTRODUCTION

A married person may dispose of the person's one-half interest in community property¹ by will or by nontestamentary transfer effective at death.² Case law has extended the statutory limitation on lifetime gifts of community property³ to donative transfers at death: A married person may not make a transfer of community property effective at death without the written consent of the person's spouse; after the death of the transferor, a donative transfer made without the required consent

1. See Prob. Code § 100. A married person may also make a testamentary disposition of the person's interest in the person's quasi-community property. See Prob. Code § 101. This recommendation does not deal with a nonprobate transfer of quasi-community property, however, since such a transfer may present different policy considerations. The Commission has reserved this matter for future review.

2. While the ability of a married person to will the property is statutory (Prob. Code § 6101), to determine the existing law on nonprobate transfers requires both a close reading of the statutes and a knowledge of the cases. See, e.g., *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in community property life insurance policy); *Estate of Wilson*, 183 Cal. App. 3d 67, 227 Cal. Rptr. 794 (1986) (Totten Trust account for benefit of third party).

So fundamental a principle--that a married person may make a nonprobate transfer of the person's one-half interest in community property--should be clear, and the Commission's recommendations on nonprobate transfers of community property will have the incidental effect of clarifying the matter.

3. Civ. Code § 5125(b) ("A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.").

may be set aside as to the one-half interest of the nonconsenting spouse.⁴

This rudimentary framework of statute and case law governing nonprobate transfers of community property has proved to be inadequate to handle this increasingly important area of law. Typical problems are revealed in two recent cases--*Estate of MacDonald*⁵ in the California Supreme Court and *Ablamis v. Roper*⁶ in the United States Court of Appeals for the Ninth Circuit.

MacDonald involved a husband who moved community property from an employee pension plan to an Individual Retirement Account (IRA), naming as beneficiary under the IRA a trust for his children from a former marriage. The wife signed a written consent to the beneficiary designation, but after her death and while her husband was still alive her personal representative revoked the consent and sought to recover the wife's one-half interest in the community property for the wife's estate. The California Supreme Court held that the wife's consent to a beneficiary designation was not a transmutation of the wife's interest in the community property into the husband's separate property, with the result that the consent remained revocable and the revocation could be exercised after the wife's death by her personal representative.

Ablamis also involved a wife's interest in her husband's community property pension plans. In that case the wife did not consent to any particular disposition of the property, and died leaving her interest in community property to a trust for her children of a former marriage. When the wife's personal representative claimed a one-half interest in each of the husband's pension plans, the United States Court of Appeals (9th Circuit) held that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts state community

4. See, e.g., *Travelers' Insurance Co. v. Fancher*, 219 Cal. 351, 26 P. 2d 482 (1933) and *Blethen v. Pacific Mutual Life Insurance Co.*, 198 Cal. 21, 243 P. 431 (1926) (beneficiary designation under life insurance policy); *Estate of Wilson*, 183 Cal. App. 3d 67, 227 Cal. Rptr. 794 (1986) (Totten trust accounts).

5. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

6. ___ F.2d ___ (9th Cir. 1991) (89-15352).

property laws and precludes the wife's estate from asserting its interest in the community property pensions.

These cases illustrate a paradox in the law governing this area: The wife's estate in *MacDonald* could recover the wife's community property interest despite the wife's consent to the husband's disposition, whereas the wife's estate in *Ablamis* could not recover the wife's community property interest even though the husband's disposition was made without the wife's consent. The cases also demonstrate both the confusion in the law over the relevant legal principles that control a nonprobate transfer of community property and a spousal consent to a transfer, and the need for statutory clarification. The cases have caused consternation in the estate planning bar over the inability of a spouse to make a coherent estate plan using standard nonprobate transfer techniques with any assurance that the law will honor the proposed disposition.

RECOMMENDATIONS

The California Law Revision Commission recommends codification of the general principles governing nonprobate transfers of community property. This is an area of law that is assuming major importance as increasing amounts of wealth are passed through nonprobate devices such as beneficiary designations in employee benefit plans, life insurance policies, living trusts, multiple party bank accounts, and the like.⁷ The law has not caught up with practice in the area, and cases have developed on a piecemeal and inconsistent basis. Codification of the general principles will benefit both practitioners and the courts in dealing with this area of law.

The Commission has adhered to the following general principles in developing specific recommendations for legislation to govern nonprobate transfers of community property:

- (1) As an equal owner of community property, each spouse should have an equal right to control disposition of half the property at death.

7. Typical nonprobate transfer devices are cataloged in Probate Code Section 5000.

(2) A spouse's written expression of intent should control over contrary statutory default rules governing disposition of a spouse's interest in community property at death.

(3) A third party acting under the terms of a nonprobate transfer instrument should be protected in making the transfer notwithstanding the existence of contrary rights in the property. Thus, for example, a pension plan trustee may make a transfer under the terms of the plan, whether or not the transfer corresponds to community property rights of spouses and beneficiaries. Disputes should be resolved among the interested parties and should not involve the neutral stakeholder.

Spousal Consent Requirement

Existing case law recognizes that a nonprobate transfer of community property at death is a donative transfer, and as such treats it in a manner similar to a gift of community property.⁸ The Commission recommends express codification of the gift rule for nonprobate transfers of community property. Thus a donative transfer of community property is voidable as to the one-half interest of the donor's spouse if made without the written consent of the spouse.

While existing law governing gifts provides for recovery of one-half of the community property gift on the death of a spouse, this remedy is unduly restrictive. The Commission recommends that for nonprobate transfers of community property made without consent, the court should have discretion to fashion an appropriate remedy, depending on the circumstances of the case. The court may, for example, order return of the value of the property instead of the property itself, or may order return of a particular item of property while allowing an item of offsetting value to pass. Likewise, the spouse should be able to proceed against the donor's estate rather than against the beneficiary of the nonprobate transfer. It may be proper, for example, simply to allow the surviving spouse a setoff for the value of the property transferred out of the share of the decedent or to give the surviving spouse a reimbursement right.

8. See discussion at notes 3 and 4, above.

Effect of Consent

The *MacDonald* case points out that a spousal consent to a nonprobate transfer of community property does not transmute the consenting spouse's community interest into separate property of the other spouse. A person who consents to a particular disposition of community property on death of the persons's spouse is consenting only to its disposition at death. Until then, the property retains its community character and is subject to all incidents of community property, including division at dissolution of marriage. This rule should be codified, but would not preclude a spouse from making a transmutation of community property if so desired by an express declaration of intent.⁹

Since a nonprobate transfer of community property, like a will, is not intended to take effect until death, it should remain revocable until that time.¹⁰ To impose some structure on the revocation process and because the original consent is in writing, a consent should only be revocable in writing. Revocation should not be effective unless the other spouse is informed of the revocation before death; this will ensure that any corresponding changes in the spouse's estate plan necessitated by the revocation can be made.¹¹

After the donor spouse dies, the ability of the consenting spouse to revoke and make a different disposition of the community property

9. See Civ. Code § 5110.730(a) ("A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined, consented to, or accepted by the spouse whose interest in the property is adversely affected.").

10. This rule would not apply to a consent that by its terms is irrevocable.

11. Where the written revocation is made in the consenting spouse's will, the additional requirement should be imposed that the will is admitted to probate before the death of the other spouse. This replaces the delivery requirement: It ensures that the revocation contained in the will is the consenting spouse's last word on the matter, and that the other spouse receives notice (through the estate administration process).

should terminate. The donative transfer has become a completed gift at this point, beyond the spouses' power to change.

Effect of Death of Consenting Spouse

The most difficult issues involve the situation presented in *MacDonald*—rights among the parties after the death of the consenting spouse but before the death of the donor spouse. May the consenting spouse's successors revoke the consent before the nonprobate transfer becomes a completed gift? May the donor spouse make changes in the terms of the gift that conflict with the terms consented to by the deceased spouse?

The court in *MacDonald* did not reach the issue of exercise of the revocation right by the consenting spouse's personal representative after the consenting spouse's death. The Commission believes the consent of a spouse to a nonprobate transfer of community property is itself a nonprobate transfer, and should become irrevocable on the death of the consenting spouse. The consenting spouse's successors should not, after the spouse's death, be permitted to undo the decedent's estate plan for their own benefit. The recommended law would honor the clearly expressed written intent of the deceased spouse with respect to disposition of the decedent's interest in the community property.

During the interim period between the death of the consenting spouse and the death of the donor spouse, the donor spouse may seek to change the terms of the proposed nonprobate transfer, for example by designating a different beneficiary or by revoking the transfer in whole or in part. In this case, the Commission recommends that the law recognize the authority of the surviving spouse to deal with and dispose of the survivor's half of the community property, but not the decedent's half. The deceased spouse is no longer able to give consent to changed terms,¹² and therefor the decedent's half should pass in

12. If the donor spouse makes a change in terms during the lifetime of the consenting spouse, on the other hand, the consenting spouse is in a position to respond. In this situation the proposed law provides that the change in terms revokes the consent, unless the consenting spouse gives further consent to the changed terms.

accordance with the decedent's last expressed intent, as indicated in the consent to the nonprobate transfer. This has the effect of preserving the right of the deceased spouse to control disposition of the decedent's one-half interest in the community property on the decedent's death.

It should be noted, however, that the surviving spouse may be in a position to judge the needs of potential beneficiaries as circumstances change in the interim period after the death of the first spouse to die. For this reason the proposed law recognizes that the spouses may determine ahead of time that by consenting to or joining in a nonprobate transfer, the spouses express confidence in the survivor to make appropriate changes in the disposition of both halves of the community property. Statutory recognition of such an agreement will enable the spouses to allow the survivor to make controlling decisions, in place of the statutory default rule that freezes the terms of the proposed disposition of the decedent's interest on death.

Note. The Law Revision Commission particularly solicits comments on the issues raised concerning the ability of the surviving spouse to make changes in a previously consented to provision for a nonprobate transfer on death.

Federal Preemption

The Commission recommends enactment of the foregoing principles as part of California law. However, it is clear from the *Ablamis* case that the California rule permitting a nonemployee spouse to make a separate disposition of a one-half interest in a community property pension plan may not be applied to employee pension plans under ERISA.¹³ The Commission plans to give this matter further review.

Retroactivity

Before *MacDonald*, a person who executed a consent to a nonprobate transfer of community property would ordinarily have assumed that the consent would dispose of the person's interest in the community in the

13. See 29 U.S.C. § 1056(d) (19___) (assignment or alienation of benefits under a covered retirement plan precluded).

manner consented to. Such a consent should be saved to the greatest extent possible, and an estate plan should not be destroyed by allowing the heirs of the consenting spouse to overturn it after the spouse's death. For this reason the Commission recommends that codification of the law governing nonprobate transfers of community property should also be applied to a spousal consent executed before the operative date of the codification.

Retroactive operation would be subject to an exception that where the consenting spouse died before the operative date of the codification, former law continues to apply. This would preserve rights of the decedent's successors that may have vested under the *MacDonald* doctrine and cannot constitutionally be disturbed.¹⁴

14. Cf. *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P. 2d 354, 218 Cal. Rptr. 31 (1985) and *In re Marriage of Fabian*, 41 Cal. 3d 440, 715 P. 2d 253, 224 Cal. Rptr. 333 (1986) (constitutional limitation on retroactive operation of Civil Code §§ 4800.1 and 4800.2).

OUTLINE

PROBATE CODE

DIVISION 5. NONPROBATE TRANSFERS

PART 1. PROVISIONS RELATING TO EFFECT OF DEATH

CHAPTER 1. GENERAL PROVISIONS

- § 5000. Nonprobate transfer at death
- § 5001. [Reserved for future use]
- § 5002. Limitations imposed by instrument
- § 5003. Protection of holder of property

CHAPTER 2. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

Article 1. General Provisions

- § 5010. "Written consent" defined
- § 5011. Governing provision of instrument, law, or consent
- § 5012. Community property rights independent of transfer obligation
- § 5013. Waiver of rights in community property
- § 5014. Transitional provision

Article 2. Consent to Nonprobate Transfer

- § 5020. Written consent required
- § 5021. Transfer without written consent
- § 5022. Written consent not a transmutation
- § 5023. Effect of modification

Article 3. Revocation of Consent

- § 5030. Revocability of written consent
- § 5031. Form and delivery of revocation
- § 5032. Effect of revocation

CONFORMING CHANGES

Civ. Code § 5110.740 (amended). Estate planning documents
Prob. Code § 141 (amended). Rights that may be waived

PART 1. PROVISIONS RELATING TO EFFECT OF DEATH

SEC. . A chapter heading is added to Part 1 (immediately preceding Section 5000) of Division 5 of the Probate Code, to read:

CHAPTER 1. GENERAL PROVISIONS

Prob. Code § 5000 (unchanged). Nonprobate transfer at death

5000. (a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(b) Included within subdivision (a) are the following:

(1) A written provision that money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(2) A written provision that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law.

Comment. Section 5000 is intended broadly to validate written instruments that provide for nonprobate transfers on death. The listing in the section of types of written instruments is not exclusive, and the section also would validate, for example, a nonprobate transfer provision in a partnership agreement, stock redemption plan, buy-sell agreement, power of appointment, and the like.

Staff Note. Section 5000 is unchanged. It is set out here for convenience of reference, together with a supplementary comment.

Prob. Code § 5001 (Reserved for future use).

Prob. Code § 5002 (added). Limitations imposed by instrument

SEC. . Section 5002 is added to the Probate Code, to read:

5002. Notwithstanding any other provision of this part, a holder of property under an instrument of a type described in Section 5000 is not required to receive, hold, or transfer the property in compliance with a provision for a nonprobate transfer on death executed by a person who has an interest in the property if either (1) the person is not authorized by the terms of the instrument to execute a provision for transfer of the property, or (2) the provision for transfer of the property does not otherwise satisfy the terms of the instrument.

Comment. Section 5002 is added to make clear that this part is not a substantive grant of authority for a person to enforce a nonprobate transfer of the person's interest in property where such a transfer is not authorized by the terms of the instrument under which the property is held. Thus, for example, a nonemployee spouse under an employee benefit plan, or a nonowner spouse under an insurance policy, is not authorized by this part to direct a nonprobate transfer of the spouse's community property interest, if any, in the plan or policy. Although this chapter does not authorize execution of a provision for such a nonprobate transfer, the holder of the property may be required by federal law, by other state law, or by the terms of the instrument itself to recognize the property interest of a spouse.

Prob. Code § 5003 (added). Protection of holder of property

SEC. . Section 5003 is added to the Probate Code, to read:

5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors.

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after the holder of the property has been served with a contrary court order or with a written notice of a person claiming an adverse interest in the property.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

Comment. Section 5003 is drawn from portions of Section 5405 (protection of financial institution under California Multiple-Party Accounts Law); see also Health & Safety Code § 18102.3; Veh. Code §§ 5910.7, 9916.7 [SB 271]. A holder of property that is the subject of a nonprobate transfer is not obligated to ascertain the respective separate, community, and quasi-community property interests in the property of participant and nonparticipant, or employee and nonemployee, or covered and noncovered, or insured and noninsured, spouses. Unless the holder of property has been served with a contrary court order or notice of an adverse claim, the holder may transfer the property in accordance with the terms of the instrument, and any adverse rights of a spouse or beneficiaries must be asserted against the estate of the person who executed the instrument or against the beneficiary, not against the holder of the property. See Sections 5012 (community property rights independent of transfer obligation), 5021 (transfer without consent).

Prob. Code §§ 5010-5032 (added). Nonprobate transfers of community property

SEC. . Chapter 2 (commencing with Section 5010) is added to Part 1 of Division 5 of the Probate Code, to read:

CHAPTER 2. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

Article 1. General Provisions

§ 5010. "Written consent" defined

5010. As used in this chapter, "written consent" to a provision for a nonprobate transfer of community property on death includes a written joinder in such a provision.

Comment. Section 5010 is intended for drafting convenience. Written joinder in a provision for a nonprobate transfer includes joint action by both spouses in writing.

§ 5011. Governing provision of instrument, law, or consent

5011. Notwithstanding any other provision of this chapter, a nonprobate transfer of community property on death is governed by all of the following:

(a) The terms of the instrument under which the nonprobate transfer is made.

(b) A contrary state statute specifically applicable to the instrument under which the nonprobate transfer is made.

(c) A written expression of intent of a party in the provision for transfer of the property or in a written consent to the provision.

Comment. Section 5011 establishes the principle that the rules in this chapter only apply in the absence of other governing provisions.

Subdivision (a) recognizes that the terms of the instrument may define the rights of the parties. See also Section 5012 (community property rights independent of transfer obligation).

Subdivision (b) makes clear that the general rules set out in this chapter are not intended to override other state statutes that are narrowly drawn to govern rights under specific named instruments. It should also be noted that this chapter cannot override preempting federal law. See, e.g., *Ablamis v. Roper*, ___ F.2d ___ (9th Cir. 1991) (No. 89-15352) (ERISA precludes testamentary disposition of community property interest of nonparticipant spouse).

Subdivision (c) makes clear that an expression of intent of the spouses in directing a nonprobate transfer of their interests in community property prevails over the default rules in this chapter.

§ 5012. Community property rights independent of transfer obligation

5012. A provision of this chapter concerning rights between a married person and the person's spouse in community property is relevant only to controversies between the person and spouse and their successors and does not affect the obligation of a holder of community property under an instrument of a type described in Section 5000 to hold, receive, or transfer the property in compliance with a provision for a nonprobate transfer on death, or the protection provided the holder by Section 5003.

Comment. Section 5012 is drawn from Section 5201 (multiple-party accounts).

§ 5013. Waiver of rights in community property

5013. Nothing in this chapter limits the effect of a surviving spouse's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2.

Comment. Section 5013 recognizes an alternate procedure for releasing rights of a surviving spouse in community property.

Waiver of a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation. Civil Code § 5110.740 (estate planning instruments).

§ 5014. Transitional provision

5014. (a) Except as provided in subdivision (b), this chapter applies to a provision for a nonprobate transfer of community property on the death of a married person, regardless of whether the provision for transfer of the property was executed by the person, or written consent to the provision for transfer of the property was given by the person's spouse, before, on, or after January 1, 1993.

(b) Subdivision (c) of Section 5030 does not apply, and the applicable law in effect on the date of death does apply, to revocation of a written consent given by a spouse who died before January 1, 1993.

Comment. Section 5014 is an exception to the rule stated in Section 3 (general transitional provision). To the extent this chapter changes the law governing the rights of successors of a person who gives written consent to a nonprobate transfer by the person's spouse, this chapter does not seek to apply the change in law to rights that vested as a result of a death that occurred before the operative date of the chapter.

Article 2. Consent to Nonprobate Transfer

§ 5020. Written consent required

5020. A provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse (1) is not effective as to the nonconsenting spouse's interest in the property and (2) does not affect the nonconsenting spouse's disposition on death of the nonconsenting spouse's interest in the community property by will, intestate succession, or nonprobate transfer.

Comment. Section 5020 is comparable to Civil Code Section 5125(b). It codifies the case law rule that the statutory community property gift limitations apply to nonprobate transfers such as beneficiary designations in trusts and accounts. See, e.g., Tyre v. Aetna Life Insurance Co., 54 Cal. 2d 399, 353 P. 2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in bank trust account); Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (beneficiary designation for United States Savings Bonds).

It should be noted that while Section 5020 makes clear that a nonconsenting spouse retains full dispositional rights over the

spouse's community property interest (subject to overriding governing principles as provided in Section 5011), this does not imply that a consenting spouse loses these rights. A written consent is revocable during the spouse's lifetime, and a revocation and contrary disposition may be made by will. See Section 5031 (form and delivery of revocation).

Section 5020 does not affect the principle that a holder of property may transfer the property as specified in the instrument. Section 5003 (protection of holder of property). But the actions of the holder do not affect rights between the spouses and their successors. See Section 5012 (community property rights independent of transfer obligation).

§ 5021. Transfer without written consent

5021. (a) In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision for transfer of the property executed by a married person without the written consent of the person's spouse, the court shall set aside the transfer as to the nonconsenting spouse's interest in the property, subject to the terms and conditions or other remedy that appears equitable under the circumstances of the case, taking into account the rights of all interested persons.

(b) Nothing in this section affects any remedy the nonconsenting spouse may have against the person's estate for a nonprobate transfer of community property on death without the spouse's written consent.

Comment. Subdivision (a) of Section 5021 is consistent with the rule applicable to present gifts of community property at termination of the marriage by dissolution or death. See, e.g., *Ballinger v. Ballinger*, 9 Cal. 2d 330, 70 P. 2d 629 (1937); *Gantner v. Johnson*, 274 Cal. App. 2d 869, 79 Cal. Rptr. 381 (1969). It implements the concept that a nonprobate transfer is a will substitute, and that a person has the right to direct a transfer of the person's one-half interest in the community property at death, with or without the spouse's consent. See, e.g., Sections 100-102 (effect of death of married person on community and quasi-community property), 6101 (property which may be disposed of by will).

Under subdivision (a) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, provide for recovery of the value of the property rather than the particular item, or aggregate property received by a beneficiary instead of imposing a division by item.

Subdivision (b) makes clear that this section does not provide the exclusive remedy where a person has directed a nonprobate transfer of community property without the written consent of the other spouse. It may be proper, for example and without limitation, simply to allow the surviving spouse an offset for the value of the property transferred out of the share of the decedent, or to give the surviving spouse a right of reimbursement.

§ 5022. Written consent not a transmutation

5022. (a) Except as provided in subdivision (b), a spouse's written consent to a provision for a nonprobate transfer of community property on death is not a transmutation of the consenting spouse's interest in the property.

(b) This chapter does not apply to a spouse's written consent to a provision for a nonprobate transfer of community property on death that satisfies Section 5110.730 of the Civil Code. Such a consent is a transmutation and is governed by the law applicable to transmutations.

Comment. Section 5022 is consistent with the result in Estate of MacDonald, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). A consent to a nonprobate transfer is in effect a consent to a future gift of the person's interest in community property, and is subject to the legal incidents provided in this chapter. Until the gift is complete, however, it remains community property and is part of the community estate for purposes of division of property at dissolution of marriage. See Section 5030 (revocability of written consent). However, if the consent specifies a clear intent to transmute the property, the expression of intent controls over this section. See Section 5011(c) (governing provision of consent).

§ 5023. Effect of modification

5023. (a) As used in this section "modification" means revocation of a provision for a nonprobate transfer on death in whole or part, designation of a different beneficiary, or election of a different benefit or payment option.

(b) If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person's spouse and thereafter executes a modification of the provision for transfer of the property without written consent of the spouse, the modification is effective as to the person's interest in the community property and has the following effect on the spouse's interest in the community property:

(1) If the person executes the modification during the spouse's lifetime, the modification revokes the spouse's previous written consent to the provision for transfer of the property.

(2) If the person executes the modification after the spouse's death, the modification does not affect the spouse's previous written consent to the provision for transfer of the property, and the spouse's

interest in the community property is subject to the nonprobate transfer on death as consented to by the spouse.

(3) If a written expression of intent of a party in the provision for transfer of the property or in the written consent to the provision for transfer of the property authorizes the person to execute a modification after spouse's death, the spouse's interest in the community property is deemed transferred to the married person on the spouse's death, and the modification is effective as to both the person's and the spouse's interests in the community property.

Comment. Section 5023 treats a modification of a nonprobate transfer during the lifetimes of the spouses as a new nonprobate transfer, as to which the living spouse may consent if so desired. If the spouse does not have legal capacity to consent at the time, consent may be obtained through substituted judgment procedures. See Section 2580 (substituted judgment). Failure of consent to the changed terms revokes the original consent to the nonprobate transfer, and the spouse's interest passes with the spouse's estate or as otherwise disposed of by the spouse. See Section 5032 (effect of revocation). It should be noted that a modification is subject to the right of the decedent to make a contrary disposition by will. Section 5031 (form and delivery of revocation).

A modification by the surviving spouse after the death of the other spouse does not affect the nonprobate transfer of the community property interest of the deceased spouse as consented to by the deceased spouse. In effect, the consent is itself a nonprobate transfer which becomes irrevocable on the death of the spouse. See Section 5030 (revocability of consent). The deceased spouse's interest in the community property is transferred as consented to by the deceased spouse, unless by the terms of the consent the deceased spouse has authorized the surviving spouse to make modifications in the nonprobate transfer. This is a special instance of the rule stated in Section 5011 that a nonprobate transfer of community property on death is governed by overriding principles, including a written expression of intent.

Note. The Law Revision Commission particularly solicits comment on Section 5023 (effect of modification).

Article 3. Revocation of Consent

§ 5030. Revocability of written consent

5030. (a) A spouse's written consent to a provision for a nonprobate transfer of community property on death is revocable during the marriage.

(b) On termination of the marriage by dissolution, the written consent is revocable and the community property is subject to division under Section 4800 of the Civil Code or other disposition on order within the jurisdiction of the court.

(c) On the death of either spouse, the written consent is irrevocable.

Comment. Section 5030 is subject to express terms to the contrary. See Section 5011 (governing provision of instrument, law, or consent). If the consent is part of a mutual estate plan, nothing in this section precludes enforcement of the mutual estate plan by appropriate remedies, including an injunction affecting revocation.

Subdivision (c), to the extent it relates to the death of the consenting spouse, overrules the effect of Estate of MacDonald, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). The consent of a spouse to disposition of the spouse's one-half interest in the community property is subject to a contrary disposition in the spouse's will. Section 5031. The spouse's personal representative may not revoke the consent to a nonprobate transfer and impose a different estate plan on the spouse's property.

It should be noted that these changes in the law are subject to Section 5014 (transitional provision).

§ 5031. Form and delivery of revocation

5031. (a) If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person's spouse, the consenting spouse may revoke the consent by a writing, including a will, that identifies the provision for transfer of the property being revoked, and that is delivered to the married person before the married person's death.

(b) Revocation of a spouse's written consent to a provision for a nonprobate transfer of community property on death does not affect the authority of the holder of the property to transfer the property in compliance with the provision for transfer of the property to the extent provided in Section 5003.

Comment. Section 5031 is consistent with subdivision (c) of Section 5030 (written consent irrevocable on death). Under this section any specific and delivered writing is sufficient, including a document purporting to be a will, whether or not admitted to probate. The will provision would change existing law as to life insurance by allowing the beneficiary designation to be overridden by an express provision in a will.

This section is subject to a contrary provision in the instrument, and the instrument may include terms that specify the manner of revocation of consent. Section 5011 (governing provision of instrument, law, or consent).

§ 5032. Effect of revocation

5032. On revocation of a spouse's written consent to a nonprobate transfer of community property on death, the property passes in the same manner as if the consent had not been given.

Comment. Section 5032 governs the substantive rights of the spouses in the community property notwithstanding overriding contractual and legal requirements that bind a holder of the community property. See Sections 5003 (protection of holder of property), 5012 (community property rights independent of transfer obligation). However, this section is subject to contrary terms of the instrument and to overriding law governing the obligation of a holder of community property to deal with the property under the particular type of instrument. See Section 5011 (governing provision of instrument, law, or consent).

For rights of a spouse who has not given written consent, see Section 5020 (written consent required).

CONFORMING CHANGES

Civ. Code § 5110.740 (amended). Estate planning documents

SEC. . Section 5110.740 of the Civil Code is amended to read:

5110.740. (a) A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in any proceeding commenced before the death of the person who made the will.

(b) A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation of the community property rights of the person executing the waiver.

(c) A written joinder or written consent to a nonprobate transfer of community property on death is a transmutation and is governed by the law applicable to transmutations and not by Chapter 2 (commencing with Section 5010) of Part 1 of Division 5 of the Probate Code) if the written joinder or written consent satisfies Section 5110.730.

Comment. Under subdivision (b) of Section 5110.740, a waiver for federal tax purposes is not a transmutation within the meaning of Section 5110.710.

Subdivision (c) is consistent with Probate Code Section 5022 (written consent not a transmutation).

Prob. Code § 141 (amended). Rights that may be waived

SEC. . Section 141 of the Probate Code is amended to read:

141. (a) The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver under this chapter:

...

(10) An interest in property that is the subject of a nonprobate transfer on death under Part 1 (commencing with Section 5000) of Division 5.

(b) Nothing in this chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a), including but not limited to the right to property that would pass from the decedent to the surviving spouse by nonprobate transfer upon the death of the decedent such as the survivorship interest under a joint tenancy, a Totten trust account, or a pay-on-death account.

Comment. Paragraph (10) is added to Section 141(a) for purposes of cross-referencing the provisions on nonprobate transfers. See also Section 5013 (waiver of rights in community property). Paragraph (10) is a specific instance of the general rule stated in subdivision (b).